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No. 88-806

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

MERLINO ENTERPRISES, INC.,
Appellant,

v.

MORRIS THOMPSON, ADMINISTRATOR (ESTATE OF FRIEDA SOUSA),
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CONNECTICUT

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether the Connecticut Supreme Court correctly held that statutory modification of the common law right of a landlord to absolute control over the term of the lease and the identity of the tenant does not constitute a *per se* taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATE STATUTES INVOLVED 2

ARGUMENT 4

THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION 4

No Conflict Exists Among Jurisdictions Regarding Application Of The Takings Clause To Mobile Home Park Regulation 4

The Decision Below Correctly Rejected A *Per Se* Taking Analysis In Accordance With Established Decisions Of This Court 7

Appellant's Claim That The Purpose Of The Connecticut Mobile Home Act Is An Improper Use Of The Police Power Was Not Raised Below, And, In Any Event, Does Not Raise A Substantial Federal Question 12

CONCLUSION 13

TABLE OF AUTHORITIES

Cases: **Page(s)**

Ballstaedt v. Amoco Oil Co., 509 F. Supp. 1095 (N.D. Iowa 1981) 9

Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955 (1962) 12

Block v. Hirsh, 256 U.S. 135, 41 S.Ct. 458 (1921) 9, 10, 13

Cider Barrel Mobile Home Court v. Eader, 414 A.2d 1246 (Md. App. 1980) 4

Eamiello v. Liberty Mobile Home Sales, Inc., 208 Conn. 620, 546 A.2d 805 (1980) 8, 11, 12

Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242, 42 S.Ct. 289 (1921) 10

Edgewater Inv. Ass'n v. Borough of Edgewater, 493 A.2d 11 (N.J. Super. App. Div. 1985), *aff'd*, 510 A.2d 117 (N.J. 1986) 7

Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 98 S.Ct. 2207 (1978) 13

F.C.C. v. Florida Power Corp., 107 S.Ct. 1107 (1987) 7, 8, 9

Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S. 875, 104 S.Ct. 218 (1983) 5, 7, 8, 9, 11

Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1120 (1988) 5, 6, 7

Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 104 S.Ct. 2321 (1984) 13

TABLE OF AUTHORITIES (continued)

Cases: **Page(s)**

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S.Ct. 348 (1964) 11

Help Hoboken Housing v. City of Hoboken, 650 F. Supp. 793 (D.N.J. 1986) 5, 7

Hilton Washington Corp. v. District of Columbia, 777 F.2d 47 (D.C. Cir. 1985) 9, 12

Kennedy v. City of Seattle, 617 P.2d 713 (Wash. 1980) 5

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164 (1982) 5, 6, 7, 8, 10, 11, 12

Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 41 S.Ct. 465 (1921) 10

Matter of Review of Health Care Admin., 415 A.2d 1147 (N.J. 1980), *cert. denied*, 449 U.S. 944, 101 S.Ct. 342 (1980) 9

Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dept. of Public Welfare, 742 F.2d 442 (8th Cir. 1984), *cert. denied*, 469 U.S. 1215, 105 S.Ct. 1191 (1985) 9

Palm Beach Mobile Homes, Inc. v. Strong, 300 So.2d 881 (Fla. 1974) 4

Pennell v. City of San Jose, 108 S.Ct. 849 (1988) 6, 7, 8, 13

TABLE OF AUTHORITIES (continued)

Cases: **Page(s)**

Pruneyard Shopping Center v. Robins, 447 U.S. 74, 100 S.Ct. 2035 (1980) 11

Sadowsky v. City of New York, 732 F.2d 312 (2d Cir. 1984) 7

Stewart v. Green, 300 So.2d 889 (Fla. 1974) 4

Swann v. Gastonia Housing Authority, 675 F.2d 1342 (4th Cir. 1982) 9

Tirolerland, Inc. v. Lake Placid 1980 Olympic Games, Inc., 592 F. Supp. 304 (N.D.N.Y. 1984) 7, 11

Troy Ltd. v. Renna, 727 F.2d 287 (3d Cir. 1984) 7, 9, 10, 12

Statutes:

Conn. Gen. Stat. § 21-79 . . . . . 2, 3, 8, 10

Conn. Gen. Stat. § 21-79(a) 2, 9

Conn. Gen. Stat. § 21-79(b) 2

Conn. Gen. Stat. § 21-79(d) 3, 9

Conn. Gen. Stat. § 21-80(b) 10

Conn. Gen. Stat. § 21-80(b)(1) 2

Conn. Gen. Stat. § 21-80(b)(1)(A) 2

Conn. Gen. Stat. § 21-80(b)(1)(B) 2

Conn. Gen. Stat. § 21-80(b)(1)(C) 2

Conn. Gen. Stat. § 21-80(b)(1)(D) 2

Conn. Gen. Stat. § 21-80(b)(1)(E) 2, 10

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MORRIS THOMPSON, ADMINISTRATOR (ESTATE OF FRIEDA SOUSA),
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ON APPEAL FROM THE SUPREME COURT
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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16.1, the appellee Morris Thompson moves the Court to dismiss the appeal filed on behalf of the appellant Merlino Enterprises, Inc., or in the alternative, to affirm the judgment of the Supreme Court of Connecticut on the grounds that:

1. It is manifest that the questions raised are so unsubstantial as not to need further argument, and;

2. One of the federal questions sought to be reviewed was not timely or properly raised and was not expressly passed upon.

STATE STATUTES INVOLVED

This appeal involves certain sections of the Connecticut Mobile Manufactured Homes and Mobile Manufactured Home Parks, Owners and Residents Act, Conn. Gen. Stat. § 21-64 *et seq.* (The "Mobile Home Act").

Conn. Gen. Stat. § 21-80(b)(1) regulates eviction of tenants who own their mobile homes and rent space from the park owner. The landlord may evict for cause, including: nonpayment of rent; material noncompliance with the tenant's statutory obligations; material noncompliance with the rental agreement and the landlord's rules and regulations. Conn. Gen. Stat. §§ 21-80(b)(1)(A), (B) and (C).

Further, the landlord may evict for two reasons unrelated to tenant misconduct. Where the tenant fails to agree to a proposed rent increase, the landlord may evict upon expiration of the term of the existing rental agreement. Conn. Gen. Stat. § 21-80(b)(1)(D). Where the landlord desires to cease use of his property as a mobile home park and put it to other use, he may do so and evict the tenant upon a one year notice. Conn. Gen. Stat. § 21-80(b)(1)(E).

Conn. Gen. Stat. § 21-79 regulates the tenant's right to sell the mobile home in the mobile home park, and the landlord's right to approve such sale. Section 21-79(a) permits the tenant to sell his mobile home within the park upon the conditions that the mobile home is safe, sanitary, in conformance with aesthetic standards of the park, and that the purchaser be bound by any rental agreement of the seller-tenant and rules and regulations of the park. Section 21-79(b) allows the landlord to approve or disapprove the condition of the mobile home for resale within the park.

Section 21-79(d) permits the purchaser of an approved mobile home to become a resident of the park, upon the condition that he meets the landlord's entry requirements and the landlord approves the entry. The landlord may refuse entry upon reasonable belief that the purchaser will use the mobile home for illegal or immoral purposes, will disturb the quiet enjoyment of other tenants, or will be financially unable to pay rent.

Nothing in section 21-79 allows the tenant or purchaser to replace an existing mobile home by locating a different mobile home in the park without the landlord's consent.

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

No Conflict Exists Among Jurisdictions Regarding Application Of The Takings Clause To Mobile Home Park Regulation.

The appellant attempts to create a conflict of authority concerning application of the physical occupation, or *per se* taking, test to statutes modifying the common law right of a landlord to absolute control over the term of the lease and the identity of the tenant. No such conflict exists; the cases cited by appellant are not inconsistent with the decision below.

In upholding the constitutionality of the challenged statutes in *Palm Beach Mobile Homes, Inc. v. Strong*, 300 So.2d 881 (Fla. 1974), the Court did not address the taking claim. The Florida Supreme Court did find that the statutory provisions extending the initial term of tenancy and prohibiting eviction except for cause, did not violate due process or equal protection in *Stewart v. Green*, 300 So.2d 889 (Fla. 1974).

The Maryland Court of Appeals employed the traditional multifactor analysis in rejecting a taking claim in *Cider Barrel Mobile Home Court v. Eader*, 414 A.2d 1246 (Md. App. 1980). Similar to the Connecticut statutes, those challenged in *Cider Barrel Mobile Home Court* prohibited eviction except upon good cause and prohibited the mobile home park owner from requiring removal of the mobile home on the basis of its sale. They did not prevent the park owner from refusing to enter into a new lease upon expiration of the existing agreement; however, such expiration and non-renewal did not constitute a statutorily-defined basis to evict the tenant.

Defendant's reliance on *Kennedy v. City of Seattle*, 617 P.2d 713 (Wash. 1980) is also inappropriate. Although lacking in a clear exposition of the proper taking analysis, the Court in *Kennedy* balanced the public and private interests as in non-*per se* taking cases. Thus, *Kennedy* did not purport to adopt a *per se* taking rule. Furthermore, *Kennedy* was bottomed upon a unique factual circumstance which had the effect of forcing the landlord to use his moorage space as rental property to others or be denied all use of his property for any purpose. The Court felt that the regulation, under those circumstances, became confiscatory. The Connecticut Statutes allow for conversion to other uses and, therefore, do not fall within the *Kennedy* rationale. Moreover, the *Kennedy* rationale has been rejected by the Supreme Court in its dismissal in *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875, 104 S.Ct. 218 (1983). *See also Help Hoboken Housing v. City of Hoboken*, 650 F. Supp. 793 (D.N.J. 1986).

Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1120 (1988), is inapposite, and does not broaden the *per se* taking rule of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164 (1982), to apply to the Connecticut Statutes.

Hall does not attempt to decide the issues presented in this case. The Court emphasized that: "[W]e cannot and do not express any view as to whether the Santa Barbara ordinance constitutes a taking. We hold only that . . . it *may*." 833 F.2d at 1282 (emphasis added). *Hall*, thus, is not intended to be that panel's final analysis of the taking issue.

To the extent *Hall* expresses opinions about the impact of the Santa Barbara regulatory scheme, it is inapposite. At issue in *Hall* was the impact of a rent control ordinance coupled with statutory tenancies. The *Hall* plaintiffs claimed that the rent control overlay took an economic value away from them and gave it to the tenants. The claim was that a tenant had the right to sell his tenancy at a premium reflecting the below-market rental rate, and achieve the economic value that

was being denied to the landlord by rent control. In this circumstance, plaintiffs complained of "the transfer of a valuable property right to occupy mobile home parks at below-market rates." 833 F.2d at 1274. The transfer to the tenant of this salable economic value denied to the landlord by rent control was "crucial" to the *Hall* opinion. 833 F.2d at 1279.

By contrast, the Connecticut Mobile Home Act does not transfer to the tenant the economic value of a right denied to the landlord. The Connecticut Act has no below-market value rent control provisions. The landlord is free to extract its economic due for its property interest by way of rent. What the Mobile Home Act does is prevent the transfer of the tenant's investment in his mobile home to the landlord by virtue of the landlord's economic dominance. In other words, the Mobile Home Act does not take the landlord's property, but rather, prevents the landlord from taking the tenant's property. *Hall* is thus inapposite.

Furthermore, *Hall*'s efficacy is questionable. Three other members of the Ninth Circuit, dissenting from the denial of rehearing *en banc*, found the *Hall* analysis "contrary to controlling authority." 833 F.2d at 1282 (Schroeder, J., dissenting from denial of *en banc* rehearing). The dissenting panel found further that the *Hall* decision was "antithetical to the reasoning of *Loretto*," 833 F.2d at 1283 and attacked the opinion for encouraging "the very 'dire consequences' that the [Supreme] Court intended to avoid in *Loretto*" when it held that the *Loretto* rationale did not apply to adjustments of the landlord-tenant relationship. 833 F.2d at 1284, *citing Loretto*, 458 U.S. at 440, 102 S.Ct. at 3178. The efficacy of *Hall*'s holding that the ordinances "seem to present a claim for taking by physical possession, as in *Loretto*," 833 F.2d at 1276, is further undermined by *Pennell v. City of San Jose*, 108 S.Ct. 849, 857-58 n. 6 (1988), in which the Supreme Court made clear that regulation of the economic relations of landlords and tenants is not a *per se* taking under *Loretto*.

Hall's inapposite facts, tentative conclusions and questioned authority cannot be read to create a conflict in authority with the decisions of the Connecticut Supreme Court. The Connecticut decisions are consistent with those of virtually every court since *Loretto* considering constitutional challenges similar to that made by appellant in finding that statutes regulating relations of landlords and tenants are not *per se* takings and, indeed, not takings at all. *See, e.g., Pennell v. City of San Jose,* 108 S.Ct. 849,857-58, n. 6 (1988); *F.C.C. v. Florida Power Corp.,* 107 S.Ct. 1107, 1112 (1987); *Fresh Pond Shopping Center, Inc. v. Callahan,* 464 U.S. 875, 104 S.Ct. 218 (1983); *Sadowsky v. City of New York,* 732 F.2d 312, 317 (2d Cir. 1984) (testing landlord-tenant regulation by the "multifactor inquiry generally applicable to nonpossessory governmental activity."); *Troy Ltd. v. Renna,* 727 F.2d 287, 302 (3d Cir. 1984) (statutory protection from eviction for certain tenants for forty years after conversion of apartments to condominiums, and eliminating eviction based upon lapse of time); *Help Hoboken Housing v. City of Hoboken, N.J.,* 650 F. Supp. 793, 798 (D.N.J. 1986) (ordinance requiring landlords to rent vacant apartments to paying tenants); *Tirolerland, Inc. v. Lake Placid 1980 Olympic Games, Inc.,* 592 F. Supp. 304, 311 (N.D.N.Y. 1984) (statute allowing government agency to exercise preferential right of leasing motel and hotel rooms and to establish rates); *Edgewater Inv. Ass'n v. Borough of Edgewater,* 493 A.2d 11, 18 (N.J. Super. App. Div. 1985), *aff'd* 510 A.2d 1178 (N.J. 1986) (statutory protections for class of tenants from conversion of rental apartments to condominiums).

The Decision Below Correctly Rejected A *Per Se* Taking Analysis In Accordance With Established Decisions Of This Court.

Appellant contends that a *per se* taking analysis should apply to the Connecticut Mobile Home Act. However, after a lengthy analysis of the extant Supreme Court authority, the Connecticut Supreme Court held:

> We conclude that § 21-79 as applied to the facts of this case does not involve the actual physical occupation of land for a public purpose, but merely regulates the use to which private property may be put.

Eamiello v. Liberty Mobile Home Sales, Inc., 208 Conn. 620, 645, 546 A.2d 805, 818 (1988). The Connecticut Supreme Court correctly applied a multifactor balancing test to the Connecticut statutory scheme regulating the relations between mobile home landlords and tenants, and rejected application of the *per se* rule of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164 (1982).

Loretto has no application to this case. The *Loretto* Court itself acknowledged that its holding "is very narrow," 458 U.S. at 441, 102 S.Ct. at 3179, and stated that: "[t]his Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." 458 U.S. at 440, 102 S.Ct. at 3178. *Accord Pennell v. City of San Jose*, 108 S.Ct. 849, 857–58 n. 6 (1988); *F.C.C. v. Florida Power Corp.*, 107 S.Ct. 1107, 1112 (1987); *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875, 104 S.Ct. 218 (1983).

Even if one were to ignore the direct self-limiting words of *Loretto* and the action of the courts in rejecting application of *Loretto* to landlord-tenant relationships, the *Loretto* analysis is not properly applied to this case.

The adjustment of landlord-tenant rights by the Mobile Home Act is markedly different than the physical invasion analyzed in *Loretto* in several respects. The park landlord has *voluntarily* transferred the rights to possess and use the property to his tenant. The Mobile Home Act produces no physical invasion of the premises by persons other than tenants who were within the reasonable contemplation of the landlord who opened his park to the tenants. *Eamiello*, 208 Conn. at 642–43, 546 A.2d at 816–17.

The mobile home park owner suffers no invasion by a stranger, but by a tenant with whom he has voluntarily negotiated a rental agreement. The Mobile Home Act allows the landlord a large degree of control over the timing, extent, and nature of the initial invasion. He can unilaterally elect not to rent to a given tenant or to accept a given mobile home into the park, or even to rent a lot at all.

The landlord has a large degree of control over the subsequent purchaser's tenancy as well. Because the purchaser-tenant assumes the rights and obligations of the seller-tenant's rental agreement, and is bound by the park rules and regulations, the landlord has significant control over the timing, extent, and nature of the invasion by the purchaser-tenant.[1]

This Court, in *F.C.C. v. Florida Power Corp.*, specifically found that in a taking analysis there is an "unambiguous distinction between a commercial lessee and an interloper with a government license." 107 S.Ct. at 1112.[2]

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[1] *See*, Conn. Gen. Stat. §§ 21-79(a) and (d).

[2] Numerous examples exist where one voluntarily engaging in a regulated business or industry is subject to regulations extending their obligations which are not takings of property, *per se* or otherwise. *See e.g., Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875, 104 S.Ct. 218 (1983) (rent control, elimination of eviction based upon lapse of time, government permission required to remove property from rental market); *Block v. Hirsh*, 256 U.S. 135, 41 S.Ct. 458 (1921) (restriction on evicting holdover tenants); *Hilton Washington Corp. v. District of Columbia*, 777 F.2d 47 (D.C. Cir. 1985) (where hotel establishes taxi cab stand, it cannot exclude any licensed taxicab); *Minnesota Ass'n. of Health Care Facilities, Inc. v. Minnesota Dept. of Public Welfare*, 742 F.2d 442 (8th Cir. 1984), *cert. denied*, 469 U.S. 1215, 105 S.Ct. 1191 (1985) (nursing home operators who accept medicaid patients are subject to rate setting for private pay patients); *Troy Ltd. v. Renna*, 727 F.2d 287 (3d Cir. 1984) (statutory tenancies after expiration of lease); *Swann v. Gastonia Housing Authority*, 675 F.2d 1342 (4th Cir. 1982) (landlord who rents to federally subsidized § 8 tenants prohibited from evicting without cause upon expiration of § 8 lease); *Ballstaedt v. Amoco Oil Co.*, 509 F. Supp. 1095 (N.D. Iowa 1981) (required renewal of franchise absent good cause for termination); *Matter of Review of Health Care Admin.*, 415 A.2d 1147 (N.J. 1980), *cert. denied*, 449 U.S. 944, 101 S.Ct. 342 (1980) (nursing home operators required to make beds available to indigent patients).

This case is also materially different than *Loretto* in the impact on the landlord's ability to dispose of his property. Section 21-80(b)(1)(E) allows the landlord to evict the tenant if he elects to change the use of his property. Thus, the landlord may dispose of his property, free and clear of any tenancy rights. Moreover, unlike *Loretto*, the mobile park owner may sell his land subject to the statutory tenancies and receive full value since the tenancy is a direct value to the owner.

This case is further distinguished from *Loretto* in that the restriction of a landlord's rights is not permanent in the same sense. The Mobile Home Act permits the park owner to evict a tenant for several reasons. Conn. Gen. Stat. § 21-80(b).

By allowing the particular occupant of the mobile home to change, Section 21-79 does not alter or expand the character, nature, extent or duration of the physical invasion created by the initial placement of the mobile home within the park for the useful life of the mobile home, or until the tenant commits cause for eviction.[3]

Loretto specifically noted that its holding does not apply to leasehold extensions, citing *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 246-48, 42 S.Ct. 289, 291-92 (1922) and *Block v. Hirsh*, 256 U.S. 135, 153-58, 41 S.Ct. 459-60 (1921). 458 U.S. at 440, 102 S.Ct. at 3178. *See also Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 41 S.Ct. 465 (1921); *Troy Ltd. v. Renna*, 727 F.2d 287, 301 (3d Cir. 1984).

Recognizing the overwhelming weight of authority contrary to its position, appellant attempts to distinguish this case from the long list of cases which uphold, against taking claims, restrictions on the right to exclude or evict. Appellant's

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[3] Section 21-80(b) creates no right in the tenant to replace a mobile home he has physically located within the park with any other mobile home, absent the landlord's consent. This statute prevents eviction based upon lapse of time only for the duration of the useful life of the mobile home.

Jurisdictional Statement at 16-18. Appellant posits that the right to transfer the benefits of these restrictions to a subsequent purchaser of the mobile home somehow transmutes this case into a *per se* taking. However, the Connecticut Supreme Court disposed of this contention by a convincing analogy:

> The additional right to transfer to a mobile home purchaser the right to continued occupancy of the site, subject to rejection of the transferee for good cause as provided in § 21-79(d), is quite similar to the common provision that a landlord may not unreasonably withhold his consent to the assignment of a lease by a tenant. Such a statutorily required condition of a lease agreement similarly does not amount to a taking of property for a use never consented to by the owner, as in *Loretto*.

Eamiello, 208 Conn. at 646, 546 A.2d at 818. If the underlying tenancy restrictions are not *per se* takings, the transfer of the rights of tenancy to a subsequent purchaser of the mobile home alters only the particular tenant who will enjoy those rights. It does not alter or expand the restrictions of the park owner's rights to use, possess, and dispose of its property.

Thus, when distilled to its essence, appellant's real complaint is that, having chosen to use its property for mobile home tenancy, it is deprived of the unfettered ability to choose and exclude *particular* tenants. Appellant's Jurisdictional Statement at 15-16. It is well settled that a landlord has no "right" to select its tenants as he sees fit, free from governmental regulation. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 259, 85 S.Ct. 348, 358 (1964), *cited by Loretto*, 458 U.S. at 440, 1025 S.Ct. at 3178. The restriction of this "right" does not constitute a taking. *Tirolerland, Inc. v. Lake Placid 1980 Olympic Games, Inc.*, 592 F. Supp. 304, 314 n. 7 (N.D.N.Y. 1984). *See, Fresh Pond Shopping Center, Inc. v. Callahan*, 104 S.Ct. 218 (1983); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82-83, 100 S.Ct. 2035, 2041-42

(1980); *Hilton Washington Corp. v. District of Columbia*, 777 F.2d 47 (D.C. Cir. 1985); *Troy Ltd. v. Renna*, 727 F.2d 287 (3d Cir. 1984). This limited restriction on the bundle of property rights does not create a "physical occupation" of the type characterized as *per se* by *Loretto*.

Thus, the Connecticut Supreme Court correctly held that the Mobile Home Act's "modification of the common law right of the lessor to absolute control of the term of the lease and the identity of his lessee . . . is not sufficiently analogous to a physical occupation of property" as in *Loretto*. *Eamiello*, 208 Conn. at 641, 546 A.2d at 816. Under such circumstances, a *per se* taking analysis is wholly inappropriate. Since appellant's basis for appeal rests entirely upon a *per se* taking analysis, and since such an analysis is so clearly inappropriate, the instant appeal fails to raise a substantial federal question.

Appellant's Claim That The Purpose Of The Connecticut Mobile Home Act Is An Improper Use Of The Police Power Was Not Raised Below, And, In Any Event, Does Not Raise A Substantial Federal Question.

Appellant's question number 3 raises the issue of whether the Connecticut Mobile Home Act is within the legitimate police power of the State of Connecticut. This issue was not raised below, and therefore cannot be raised now. *Beck v. Washington*, 369 U.S. 541, 549–54, 82 S.Ct. 955, 960–62 (1962); Sup. Ct. R. 16.1(b). For this reason alone, the appeal should be dismissed.

Even if properly raised below, no substantial federal question is raised by appellant. The Connecticut Supreme Court has clearly set out the purpose of the Mobile Home Act as regulating the economic rights of mobile home landlords and tenants. *Eamiello*, 208 Conn. at 646–50, 546 A.2d at 818–19. It is well-settled that such regulatory adjustment of economic benefits and burdens is squarely within the legitimate police

power, and no serious question regarding the police power exists. *See Pennell v. City of San Jose*, 108 S.Ct. 849, 858 (1988); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241-42, 104 S.Ct. 2321, 2330 (1984); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124-25, 98 S.Ct. 2207, 2213 (1978); *Block v. Hirsh*, 256 U.S. 135, 154-56, 41 S.Ct. 458, 459 (1921).

CONCLUSION

For the foregoing reasons, this Court should dismiss the appeal for want of a substantial federal question, and because a question upon which this appeal depends was not timely or properly raised below, or, in the alternative, summarily affirm.

Respectfully submitted,

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